

SIGNED.

Dated: January 29, 2019




Paul Sala, Bankruptcy Judge

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7 **IN THE UNITED STATES BANKRUPTCY COURT**
8 **FOR THE DISTRICT OF ARIZONA**

9 In re:
10
11 SKY HARBOR HOTEL PROPERTIES,
12 LLC,
13 Debtor.

Chapter 11 Proceeding
Case No. 2:17-bk-08082-PS

14 SKY HARBOR HOTEL PROPERTIES,
15 LLC,
16 Plaintiff,
17 vs.
18 PATEL PROPERTIES, LLC,
19 Defendant.

Adversary No. 2:18-ap-00126-PS

**ORDER CERTIFYING QUESTION
TO ARIZONA SUPREME COURT¹**

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24 **I. CERTIFIED QUESTIONS**

25 Reorganized Chapter 11 debtor Sky Harbor Hotel Properties, LLC ("SHHP"), filed an
26 adversary complaint against Patel Properties, LLC ("Patel"), asserting that Patel, a member in

27 ¹ Concurrent with the entry of this Order, in the case of *MorrisAnderson & Associates v. Redeye, LLC, et al.*,
28 2:14-ap-00534-DPC, Bankruptcy Judge Daniel Collins is entering an Order certifying similar questions to the Arizona Supreme Court.

1 SHHP, breached its common law fiduciary duty to SHHP. Patel, citing primarily to *TM2008*
2 *Investments, Inc. v. Procon Capital Corp.*, 234 Ariz. 421, 323 P. 3d 704 (App. 2014), filed a
3 Motion for Summary Judgment arguing that as a member it does not owe a common law
4 fiduciary duty to SHHP. SHHP objected to Patel's Motion for Summary Judgment arguing
5 that no Arizona court has ruled whether a manager or member of an LLC owes a common law
6 fiduciary duty to the company.² SHHP distinguish *Procon* by noting that it addressed only the
7 lack of common law fiduciary duties among members of an LLC. Neither party nor this Court
8 have been able to find any Arizona case that addresses the existence (or lack thereof) of an
9 LLC manager's or member's common law fiduciary duty to the company.

10 Where the determination of the legal issues raised in Patel's Motion for Summary
11 Judgment may be case dispositive, this Court respectfully requests, pursuant to A.R.S. § 12-
12 1861 and Arizona Supreme Court Rule 27, that the Arizona Supreme Court exercise its
13 discretion to answer the following certified questions:

- 14 **1. Whether a manager of an Arizona Limited Liability Company owes common**
15 **law fiduciary duties to the company?**
- 16 **2. Whether a member of an Arizona Limited Liability Company owes common**
17 **law fiduciary duties to the company?**

18 **II. BACKGROUND FACTS**

19 On July 14, 2017, SHHP filed a voluntary petition for relief under chapter 11 of the
20 United States Bankruptcy Code. SHHP's bankruptcy petition was signed by Shane Kuber for
21 SKK, LLC, SHHP's purported manager. Patel filed a Motion to Dismiss SHHP's bankruptcy
22 case asserting that SKK was not SHHP's manager and was therefore not authorized to file the
23 bankruptcy petition. The Court denied the Motion to Dismiss after finding that SKK was
24 SHHP's manager as of February 3, 2014.

25 On March 23, 2018, this Court confirmed SHHP's plan or reorganization which

26 ² Citing Thompson et al., § 12:65. *Duties of managers and members*, 6 Ariz. Prac., Corporate Practice § 12:65
27 (updated Nov. 2017) ("*Unanswered Questions*. Arizona appellate courts have yet to decide cases in which parties
28 argue that members or managers of an Arizona LLC have common law fiduciary duties in situations where the
operating agreement is totally silent on the issue or where the operating agreement provides for limited duties that
do not include all three duties found in the *Procon* case.").

1 generally provided for the sale of SHHP's real property and preserved SHHP's pre-bankruptcy
2 causes of action. After plan confirmation, SHHP filed an adversary complaint against Patel
3 asserting claims for (a) Breach of Fiduciary Duty; (b) the Determination of Patel's Interest (if
4 any) in SHHP; and (c) Equitable Subordination of Patel's Interest in SHHP.

5 Patel filed a Motion for Summary Judgment seeking judgment on all of SHHP's claims
6 "because Patel does not owe a fiduciary duty to SHHP." According to Patel, all of SHHP's
7 claims depend on SHHP's claim that Patel breached a common law fiduciary duty to SHHP.
8 Patel cites to *Butler Law Firm, PLC v. Higgins*, 243 Ariz. 456, 410 P. 3d 1223, 1229 (Sup. Ct.
9 2018) and *TM2008 Investments, Inc. v. Procon Capital Corp.*, 234 Ariz. 421, 323 P. 3d 704
10 (App. 2014) for the proposition that members of an Arizona LLC do not owe common law
11 fiduciary duties to the company or other members.

12 In its objection to Patel's Motion for Summary Judgment, SHHP asserts that neither
13 *Butler* nor *Procon* address the existence of a member's or manager's fiduciary duties to a LLC.
14 After pointing out that no Arizona case has found that a member has no fiduciary duty to a
15 company, SHHP cited the Court to the unpublished Memorandum Decision of the Court of
16 Appeals in *Sports Imaging of Arizona, L.L.C. v. 1993 CKC Trust*, 2008 WL 4448063 (App.
17 2008) for the proposition that the court recognized and concluded "that a co-manager in an
18 LLC could be liable for breaching a fiduciary duty." SHHP also cited the Court to a trial court
19 minute entry in *CAL X-TRA v. Phoenix Holdings II, LLC*, No. CV 2003-008362, 2016 WL
20 8222723, at *1 (Ariz. Super. Oct. 11, 2016) for the proposition that an operating agreement
21 may impose obligations which parallel traditional corporate fiduciary duties.

22 Neither party was able to cite the Court to Arizona precedential authority on the direct
23 questions raised in the Motion for Summary Judgment – namely, whether Patel, as a member
24 or manager of SHHP, owed common law fiduciary duties to SHHP? While the Division 1
25 decision in *Procon* does stand for the proposition that a member of an Arizona LLC does not
26 owe common law fiduciary duties to other members, it does not address the existence (or lack
27 thereof) of such duties to the company. In *Procon*, the trial court denied a motion to dismiss
28 finding that "appellate courts will likely find ... a fiduciary duty owed by a member of an LLC

1 such as Doveland to another member.” *Procon*, 234 Ariz. at 424, 323 P.3d at 707. Thereafter,
2 the jury was instructed that

3 Members in an L.L.C. owe a special duty to one another, which is called a
4 fiduciary duty. This duty requires Members to deal in utmost good faith with
5 one another and fully disclose to one another all material facts relating to the
6 L.L.C.'s affairs within their knowledge.

7 *Id.* at 426, 323 P.3d at 709. The appellate court reversed the trial court holding that the trial
8 court erred by imputing a common law fiduciary duty to an LLC member based solely on
9 principles applicable to closely-held corporations and/or partnerships. *Id.* at 425, 323 P.3d at
10 708. The appellate court noted that the Arizona LLC Act does not refer to any baseline
11 fiduciary duties that members of the LLC owe to the LLC or to one another. *Id.* at 424, 323
12 P.3d at 707. Refusing to mechanically apply fiduciary duty principals from the law of closely
13 held corporations or partnerships to a limited liability company organized under Arizona law,
14 the appellate court instead looked to A.R.S. § 29-682(B) which allows members to create an
15 operating agreement that delineates the duties member owe each other. *Id.* at 425, 323 P.3d at
16 708. The appellate court held that the jury should have been advised of those delineated
17 duties, not common law fiduciary duties applicable to closely held businesses and
18 partnerships. *Id.*, 234 Ariz. at 426, 323 P.3d at 709.

19 *Butler*, 243 Ariz. 456, 410 P. 3d 1223, 1229 (Sup. Ct. 2018), provides the Court with
20 no assistance. While the Supreme Court in *Butler* does cite to *Procon* for the statement that
21 “LLC members do not owe each other fiduciary duties unless they are expressly included in
22 the LLC operating agreement” [*Butler*, 243 Ariz. at 462, 410 P.3d at 1229], the case concerned
23 a venue issue and the question of member duties was not before the Court.

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